Supreme Court of the United States.

No. 39.—October Term, 1903.

United States Fidelity and Guaranty Company, Plaintiff in Error, vs. The United States, for the use, &c.	On certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[December 7, 1903.]

This was an action originally begun in the Circuit Court for the District of Colorado by the United States, for the use and benefit of the Golden Pressed and Fire Brick Company, (hereinafter called the Brick Company,) against John A. McIntyre and the United States Fidelity and Guaranty Company, (hereinafter termed the Guaranty Company,) upon a bond executed April 11, 1898, in pursuance of an act of Congress of August 13, 1894, (28 Stat. 278,) to secure the performance of a contract theretofore entered into by McIntyre with the Secretary of the Treasury to furnish all the labor and materials and do all the work required for the foundation and superstructure of a mint in the city of Denver.

The questions certified are founded upon the following facts: McIntyre, having agreed to erect the building, executed a bond to the United States, with the Guaranty Company as surety, conditioned not only upon the faithful performance of his work to erect the building according to his contract, and to any changes or additions made thereto, but to "promptly make payment to all persons supplying him labor or material in the prosecution of the work contemplated by said contract." During the progress of the work the Brick Company furnished the contractor brick for the construction of the building to the amount of $6,517.55, which had been reduced by payments to $2,711.65, for which the action was brought.

The defendant denied its liability upon the ground that on October 1, 1898, the Brick Company, without the knowledge or consent of the Guaranty Company, granted to McIntyre an extension of the time of payment of the balance then due on account of the purchase price of such brick; and accepted two promissory notes, one for thirty days after date, (October 1,) and another sixty days after September 15, 1898, the first one of which was paid. There was no allegation that, by reason of the extension of the time of payment of the sum so due on October 1, the Guaranty Company had sustained any loss or injury, but it was insisted that it was

nevertheless thereby released and discharged from any further liability upon such bond.

The Circuit Court held that the extension did not operate to discharge the Guaranty Company from its liability, and the Circuit Court of Appeals, to which the case was carried, certified to this court the following questions of law arising from these facts:

"First. Did the action of the Brick Company on October 1, 1898, in taking two promissory notes, one for the sum of $1,275 and the other for the sum of $2,508.10, for the amount of the Brick Company's account, then due and payable, one of said notes running for thirty days and the other for sixty days, and each bearing ten per cent interest per annum from date, operate to discharge the United States Fidelity & Guaranty Company from its liability, assumed under the provisions of the aforesaid bond, to pay to the Golden Pressed & Fire Brick Company the amount of said indebtedness?

"Second. Did the extension of the time of payment of the balance due from said McIntyre, on October 1, 1898, by the taking of two notes in the manner and form aforesaid, operate to discharge the United States Fidelity & Guaranty Company of its liability to pay the amount of said indebtedness to the Brick Company, irrespective of the question whether said Guaranty Company did or did not sustain an actual loss or damage on account of such extension?"

Mr. Justice BROWN delivered the opinion of the Court.

This bond was given in pursuance of the act of 1894, (28 Stat. 278,) "for the protection of persons furnishing materials and labor for the construction of public works." The act requires, in substance, that persons contracting with the United States for the construction of any public building, &c., shall be required, before commencing such work, to execute the usual penal bond, "with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract," with a right on the part of the materialman to bring suit in the name of the United States for his use and benefit against the contractor and his sureties. The bond in this case contained two entirely distinct and separate obligations: First, that McIntyre should fullfil all the conditions and covenants of his contract, whatever changes in or additions to such contract might thereafter be made; and, second, promptly make payment to all persons supplying him labor and materials in the prosecution of the work. Of course, these covenants are to be read together and the latter interpreted in the light of the former.

The question involved is whether the ordinary rule that exonerates the guarantor, in case the time fixed for the performance of the contract by

the principal be extended, applies to a bond of this kind executed by a Guaranty Company, not only for a faithful performance of the original contract, but for the payment of the debts of the principal obligor to third parties. It is conceded that, by the general law of suretyship, any change whatever in the contract for the performance of which the guarantor is liable, made without his consent, such, for instance, as an extension of time for payment, if made upon sufficient consideration, discharges the guarantor from liability. (*Miller* v. *Stewart*, 8 Wheat. 651; *Smith* v. *United States*, 2 Wall. 219; *Reese* v. *United States*, 9 Wall. 13.)

Counsel for the Brick Company argued with much persuasiveness that this rule of *strictissimi juris*, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the Guaranty Companies, recently created, which undertake, upon the payment of a stipulated compensation and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract. It is, at least, open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of *strictissimi juris*, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment. The government wisely protects itself in these cases by providing in the bond that the obligation of the surety shall extend to all changes in or additions to the contract, which may thereafter be made—a clause which we have held extends to such changes as might be found advantageous or necessary in the plans or specifications, but does not extend to a change in the location of the structure to be built. (*United States* v. *Freel*, 186 U. S. 309.) But no provision was made in the bond in that case with respect to the obligation of the principal and his surety to make payment to all persons supplying labor or material to the contractor in the prosecution of his work.

We do not, however, deem it necessary to express an opinion upon this subject, as we prefer to rest our decision upon the peculiar character of the covenant upon which this action is brought. In an ordinary guaranty the guarantor understands perfectly the nature and extent of his obligation. If he becomes surety for the performance of a building contract, he is presumed to know the parties, the terms of their undertaking, the extent and feasibility of the work to be done, the character and responsibility of the principal obligor, and his ability to carry out the contract. If he guarantees the payment of a particular debt, he usually knows the exact amount of the debt, the time when it matures, and something of the ability of the principal to meet it. If he becomes responsible for the payment of

the principal's debts generally, or lends his credit to a proposed purchaser of goods, he knows the amount of his liability and the means of his principal to meet them. In such cases he contracts in reliance upon the exact terms of his principal's undertaking, and has a right to suppose that no change will be made without his consent; and the courts have gone so far as to hold that any change will exonerate him, though it really redound to his benefit.

This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. Inasmuch as neither the contractor nor his sub-contractor can secure themselves by a mechanic's lien upon the proposed building, the government, solely for the protection of the latter, requires a covenant for the prompt payment of his claims, and the same security that it requires for the performance of the principal contract. In this covenant the surety guarantees nothing to the principal obligee—the government—though the latter permits an action upon the bond for the benefit of the sub-contractors. The covenant is made solely for their benefit. The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of sixty days, or whether, after the materials are furnished, the time for payment is extended sixty days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability he ought not to complain when that uncertainty becomes certain.

Stress is laid upon the fact that the defendant company guaranteed that the principal obligor should "promptly" make payment to his materialmen, and that this, properly interpreted, required that the contractor should pay at once upon the maturity of the bills, and that as such bills became due October 1, 1898, the promptness guaranteed required their immediate payment. We are not impressed with the force of this contention. If the word "promptly" has any particular significance in this connection, it is satisfied by such payment as the sub-contractor shall accept as having been promptly made; or perhaps it was intended to give him an immediate action upon the bond, in case such payment be not made with sufficient promptness. It was not intended, however, that the want of an immediate payment should be set up as a defense by the surety. As these bills are rarely paid the very day they become due, the narrow construction claimed would destroy the principal value of the security.

The facts of this case do not call for an expression of opinion as to whether, if an unusual credit were given, and in the meantime the principal obligor had become insolvent, or the surety were otherwise damnified by the delay, it might not be exonerated; since neither of these contingencies supervened in this case, and we are remitted to the naked proposition whether the giving of a customary credit, with no evidence of loss thereby occasioned, is sufficient to discharge the surety. We find no difficulty whatever in answering this question in the negative. The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the sub-contractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a sub-contractor, as was the case in *United States* v. *American Bonding & Trust Co.*, (89 Fed. Rep. 921, 925,) or to cases not otherwise within the scope of the undertaking.

Bonds containing the covenant in question are not common, though they have sometimes appeared in the State courts, and the construction here given them has been generally adopted, (*United States* v. *Hazard*, 53 N. Y. App. Div. 410,) although these cases have generally turned upon the question whether the rights of the materialmen were affected by a change made in the contract by the principals. (*Dewey* v. *State*, 91 Ind. 173; *Conn* v. *State*, 125 Ind. 514; *Steffes* v. *Lemke*, 40 Minn. 27; *Doll* v. *Crume*, 41 Neb. 655; *Kaufman* v. *Cooper*, 46 Neb. 644; *Griffith* v. *Rundle*, 23 Wash. 453.)

Both of the questions certified are answered in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.